

***United States Court of Appeals
for the Second Circuit***



**APPELLEE'S
PETITION FOR
REHEARING**

O R I G I N A L

74-1749

74 - 1749

In The
UNITED STATES COURT OF APPEALS
For the Second Circuit

IRVING GORDON,

Plaintiff-Appellant,

V.

ROBERT L. BURR and ELPAC, INC.,

Defendants-Appellees,

and

ARNOLD LORD and PHILIPS, APPEL &
WALDEN, INC. (sued herein as PHILLIPS,
APPEL & WALDEN),

Defendants-Appellees-
Appellants.

PETITION OF APPELLEE--CROSS-
APPELLANT LORD FOR REHEARING

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To the Honorable Judges of the United States
Court of Appeals for the Second Circuit

Defendant-Appellee-Appellant Lord hereby re-
spectfully petitions this Court for rehearing of that
portion of its decision of November 20, 1974, which
affirmed the district court decision on the matters raised

by defendant Lord's cross-appeal and thereby upheld defendant Lord's liability to plaintiff under §10(b) of the Securities Exchange Act of 1934.

Rehearing is sought pursuant to Rule 40 of the Federal Rules of Appellate Procedure, on the ground that the above-referenced portion of this Court's decision of November 20, 1974, overlooks two dispositive deficiencies in plaintiff's case against defendant Lord under §10(b) of the 1934 Act.

The liability of defendant Lord is based solely upon a finding that he made two representations to plaintiff (Slip opinion, p. 444). This Court expressly concluded that these representations were material within the meaning of §10(b) (Slip opinion, p. 445). However, the Court did not express any conclusion with respect to the falsity of those representations, nor with respect to plaintiff's reliance thereon. The presence of both of these elements is indispensable to a finding of liability under §10(b) of the 1934 Act.

Defendant Lord respectfully urges that this Court reconsider its decision with respect to his cross-appeal because there is no proof that the first representation was false and plaintiff could not have relied upon the second representation.

POINT I

THERE IS NO PROOF
OF FALSITY OF THE
FIRST ALLEGED
REPRESENTATION

This Court found the first representation to have been as follows:

. . .shortly after the June, 1968, meeting, Lord advised Gordon that the other offerees had already indicated their intention to purchase by completing certain documents;. . . (Slip opinion, p. 444).*

The initial question is: did plaintiff prove by a fair preponderance of the credible evidence that this statement was false?

He did not. Plaintiff's testimony is that there were six "other offerees". He called only one of the six as a witness at trial (Stuart Steinberg, Jr. -- Appendix 235a-242a), and failed to ask him if he had completed the documents.

Nor does any other testimony, or any document in evidence, speak to this point. Plaintiff simply made no effort to prove the falsity of this first alleged representation. Referring back to the complaint it will be re-

* This phrasing of the first representation is somewhat different from that of the district court -- "Gordon was told by Lord that all of the other members of the group had executed the documents then presented to Gordon " (Appendix 29a).

called that plaintiff alleged nine misrepresentations. That other offerees had completed certain documents was not one of the nine. It appears plaintiff chose not to allege or seek to prove the falsity of such a representation because it was not false.

Whatever plaintiff's reason, the critical point is that there is no proof of falsity. This is not a situation where the question is sufficiency of the evidence or credibility of witnesses; this is a situation where the record is absolutely barren. There is not one shred of evidence from which a finding can be made that the "other offerees" did not sign the documents.

Indeed the record positively establishes that Stuart Steinberg, Jr. (the only "other offeree" who testified at trial) did intend to purchase Elpac stock from Burr as of, and after, July 18, 1968, the date on which plaintiff signed the documents in question. Plaintiff testified that Stuart Steinberg, Jr. negotiated the price of the stock down from \$12 per share to \$10 per share (Appendix 152a-153a). As of July 18, 1968, the price was still \$12 per share (Appendix 340a-345a). Therefore Stuart Steinberg, Jr.'s intention to purchase had to have continued to exist on and after July 18, 1968. It is equally clear that plaintiff knew of Stuart Steinberg, Jr.'s interest and

continuing negotiations after July 18, 1968, because he knew of the price reduction (Appendix 153a).

This record supports only one conclusion -- that plaintiff failed to prove that the other offerees did not sign the documents.

Additionally, plaintiff did not rely upon the documents in question as a final expression of intention, because after July 18, 1968, he was fully aware of the continuing price negotiations involving the other offerees. Thus prior to August 21, he knew that the other offerees had an intention to purchase, but had not made a final decision. He could not have relied upon the signing of the documents as an expression of a final decision.

POINT II

IT IS NOT POSSIBLE FOR PLAINTIFF TO HAVE RELIED UPON THE SECOND ALLEGED REPRESENTATION

This Court found the second representation to have been as follows:

...the day after Gordon wired Burr the funds, Lord (along with Burr) reassured Gordon that the other offerees had also completed their purchases. (Slip opinion, p. 444).

Here the determinative question is: could plaintiff have relied upon this representation in deciding to purchase Burr's stock?

At the latest, plaintiff decided to purchase Burr's stock on August 21, one day before this second representation. The above quotation from this Court's

opinion recites the chronology correctly. On August 21, 1968, plaintiff took the last action necessary on his part to close the transaction -- he delivered the price. The only representations upon which plaintiff could have relied in taking that final action were those conveyed to him on or before August 21; nothing said to him on August 22 could have caused actions taken one day before.

Despite the varying findings as to what was said on August 22, there is complete unanimity as to the day on which it was said, and that it was after the transaction. Whether the Court approaches this issue in terms of "causation-in-fact" or "reliance", the conclusion must be the same -- a representation made after the event can not be the basis for a finding of liability under §10(b).

Although the last action by plaintiff respecting his decision to purchase Elpac stock from Burr was transmittal of the price on August 21, he had made his decision to purchase much earlier. This fact makes the absence of reliance even clearer. Plaintiff testified that he intended to purchase the stock on July 18, 1968 (Appendix 133a-134a; see also 90a-91a). In addition, it is not disputed that as early as May-June, 1968, plaintiff sought out the opportunity to make a private purchase of Elpac at a sub-

stantial discount from market price.

This plaintiff's decision-making process actually concluded months before August 22, and his final act in completion of the transaction occurred on August 21, a full day before the alleged misrepresentation.

CONCLUSION

The effect of this Court's decision of November 20, 1974, is to obligate defendant Lord to return to plaintiff funds which defendant Lord never received, possessed, or benefited from. Defendant Lord now petitions for rehearing urging that such a harsh remedy should not be imposed where plaintiff has failed to prove liability. Falsity and reliance (or causation-in-fact) may not be overlooked. It is apparent that falsity was not proved with respect to one of the two alleged representations; and that reliance was an impossibility with respect to the other. Defendant Lord respectfully requests that rehearing be granted and that the Court reverse the district court decision on the issues raised by defendant Lord's cross-appeal.

Respectfully submitted,

BUTOWSKY, SCHWENKE & DEVINE
Attorneys for defendant-
appellee-appellant Lord

Of counsel:

MICHAEL C. DEVINE



UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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IRVING GORDON, :

Plaintiff-Appellant, :

-against- : Appeals Nos. 74-1749;

ROBERT L. BURR and ELPAC, INC., : 74-1840; 74-1865

Defendants-Appellees, : AFFIDAVIT OF SERVICE

and :

ARNOLD LORD and PHILIPS, APPEL & :
WALDEN, INC. (sued herein as PHILLIPS, :
APPEL & WALDEN), :

Defendants-Appellees- :
Appellants. :

-----X

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

REBECCA G. STEINER, being duly sworn, deposes and says:

I served the attached Petition For Reargument upon
Leonard Loewinthan, Esq.; Balterman & Geist; Rogers & Cooper;
Bressler, Meislin, Tauber & Lipsitz, on December 4, 1974, by
depositing a copy in the United States mails, postpaid, addressed
to them at One East 57th Street, New York, New York 10022; 10 East
40th Street, New York, New York 10016; 60 East 42nd Street, New
York, New York 10017; and 90 Broad Street, New York, New York 10004,
respectively.

Rebecca G. Steiner
Rebecca G. Steiner

Sworn to before me this
4th day of December, 1974.

Michael C. Devine
Notary Public

MICHAEL C. DEVINE
NOTARY PUBLIC, State of New York
No. 60-0937280
Qualified in Westchester County
Cert. filed in New York County
Commission Expires March 30, 1975